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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY D. NEUKAM,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-0611-CR-504

APPEAL FROM THE VANDERBURGH CIRCUIT COURT

The Honorable David D. Kiely, Magistrate

Cause No. 82C01-0512-FD-1451

September 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Terry Neukam appeals his conviction and sentence for theft as a class D felony.¹

Neukam raises three issues, which we revise and restate as:

- I. Whether the trial court abused its discretion by admitting into evidence testimony regarding the contents of electronic evidence without requiring admission of the evidence itself as the best evidence;
- II. Whether the trial court abused its discretion by instructing the jury concerning accomplice liability;
- III. Whether the trial court abused its discretion in sentencing Neukam; and
- IV. Whether Neukam's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.²

¹ Ind. Code § 35-43-4-2(a) (2004).

² Neukam included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 54-62. We remind Neukam that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
- (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the

The relevant facts follow. At 6:30 p.m. on December 27, 2005, Neukam and Terry Hill entered a drugstore. Johnny Biggerstaff, the drugstore's assistant store manager, two cashiers, and Neukam and Hill were the only people in the drugstore. One of the cashiers called Biggerstaff and asked him to keep an eye on the two individuals. Biggerstaff observed Neukam and Hill from his office and then went onto the store floor. Neukam picked up a stick of beef jerky, opened it, and ate it. Neukam grabbed a bottle of wine, put it in his left pocket, and put his shirt over it. Hill knocked a security cap³ off of a bottle of liquor. Hill put other bottles in his pants, and one of the bottles had the security cap "knocked off." Transcript at 45. Biggerstaff asked Hill what he was doing, and Hill said, "Oh, the cap just fell off." Id. at 19. Biggerstaff said, "Well no, it didn't fall off, you pried it off." Id. Hill said, "Oh no, I didn't pry it off." Id. Biggerstaff said, "Well you guys are gonna have to pay for this." Id. at 20. Hill said, "We're not payin' for shit," and Neukam and Hill laughed. Id. Biggerstaff called the police, and as Neukam and Hill were leaving, Biggerstaff said, "I'm on the phone with the police. You have to . . . you have to wait here." Id. at 21. Neukam and Hill laughed, left the store without paying, and drove away in a van. Biggerstaff gave the police the van's license plate number.

case and the document and location within the document to which the redacted material pertains.

³ The security caps were part of a security system that would activate the drugstore's alarms if they were taken out of the store without being removed or deactivated.

Vanderburgh County Sheriff's Deputy Jeff South spotted the van in a nearby parking lot. Neukam exited the driver's side of the van and began walking towards a home improvement store. Deputy South detained Neukam and searched the van, which revealed two bottles of whiskey and a bottle of wine.

The State charged Neukam with theft as a class D felony and receiving stolen property as a class D felony.⁴ The State later dismissed the charge of receiving stolen property. At trial, the prosecutor asked Biggerstaff about the drugstore's electronic journal, which keeps a record of everything sold, and whether he could determine whether any bottles of whiskey or wine were sold in the hour before Neukam and Hill entered the drugstore. Neukam objected and stated "if we have that . . . access to that we can cross-examine it, however, this goes straight on . . . on a word and we can't cross-examine that." Id. at 43-44. The trial court overruled the objection. Biggerstaff testified that, based on the records, none were sold. Neukam also objected to the proposed instruction regarding accomplice liability because the prosecutor did not make "any reference that [Neukam and Hill] acted in concert with one another or in any way acted together in the commission of this offense." Id. at 89. The trial court overruled the objection and gave the jury the accomplice liability instruction.

The jury found Neukam guilty of theft as a class D felony. The trial court found Neukam's criminal history and the facts surrounding the case as aggravators and found

⁴ Ind. Code § 35-43-4-2(b) (2004).

no mitigators. The trial court sentenced Neukam to three years in the Indiana Department of Correction.

I.

The first issue is whether the trial court abused its discretion by admitting into evidence testimony regarding the contents of electronic evidence without requiring admission of the evidence itself as the best evidence. Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of testimony only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs “where the decision is clearly against the logic and effect of the facts and circumstances.” Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Neukam appears to argue that the trial court erred when it allowed the drugstore’s assistant manager to testify that the drugstore’s electronic records showed that no bottles of wine or Jack Daniel’s whiskey were sold during the time Neukam was in the drugstore. Neukam cites the “best evidence” rule, Ind. Evidence Rule 1002, which provides that “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

The following exchange occurred during the redirect examination of the assistant manager:

Q Okay. You mentioned something about an electronic journal you have.

A Uh huh.

Q What is that?

A What an electronic journal is, is basically, all the cash registers are electronic and any UPC that goes through the register, I can go in on my computer system in the office and look and see what's been sold. Like for instance, I look to see if liquor's been sold on Sunday.

[Neukam's Attorney]: Objection. Objection as to any (inaudible) unless he has that log that we can look at and . . . cross-examine based upon, I would object to this form of questioning.

[Prosecutor]: Just asking about the system at this point, Judge.

BY THE COURT: Yeah, show the objection overruled.

* * * * *

Q And, uh, after this theft that night, did you examine that record?

A Yes I did.

Q Could you determine whether any bottles of, uh, Jack Daniels or wine were sold in that hour?

[Neukam's Attorney]: Objection. Again, if we have that . . . access to that we can cross-examine it, however, this goes straight on . . . on a word and we can't cross-examine that.

BY THE COURT: Show the objection overruled.

Q Could you determine whether any were sold?

A They were not.

Q So based on your examination of these records, none were sold?

A None were sold.

Transcript at 43-44.

Neukam did not challenge the accuracy of the assistant manager's description of the electronic records nor does he challenge it on appeal. To be entitled to reversal for the improper use of secondary evidence, an effective objection must identify an actual dispute over the accuracy of the secondary evidence. Jones v. State, 780 N.E.2d 373, 378 (Ind. 2002). Because there is no dispute as to the accuracy of the assistant manager's testimony, any error in admitting the description in lieu of the actual electronic records was harmless. See id. (holding that any error in admitting the description of a scene in a movie in lieu of the actual movie was harmless).

II.

The next issue is whether the trial court abused its discretion by instructing the jury concerning accomplice liability. The trial court instructed the jury as follows:

A person may be charged as a principal and may be found guilty of the offense if he or she knowingly or intentionally aids, induces, or causes another person to commit an offense if the other person:

1. Has not been prosecuted for the offense;
2. Has not been convicted of the offense; or
3. Had been acquitted of the offense.

Transcript at 142.⁵

⁵ We note that this instruction is missing the word "even." Ind. Code § 35-41-2-4, which governs aiding, inducing or causing an offense, provides:

We review the grant of a jury instruction for an abuse of discretion. Benefiel v. State, 716 N.E.2d 906, 914 (Ind. 1999). To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give tendered jury instructions, we consider: "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." Chambers v. State, 734 N.E.2d 578, 580 (Ind. 2000), reh'g denied.

In addressing the propriety of the above instruction in these circumstances, we note that under the theory of accomplice liability, an individual who aids, induces, or causes the commission of a crime is equally as culpable as the person who actually commits the offense. Ind. Code § 35-41-2-4 (2004). The accomplice liability statute does not set forth a separate crime, but merely provides a separate basis of liability for the crime that is charged. Hampton v. State, 719 N.E.2d 803, 807 (Ind. 1999). Therefore,

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, *even* if the other person:

- (1) has not been prosecuted for the offense;
- (2) has not been convicted of the offense; or
- (3) has been acquitted of the offense.

(Emphasis added). The basis of Neukam's objection was not that the instruction was an incorrect statement of law because it did not contain the word "even," and any error on this basis is not at issue in this appeal.

where the circumstances of the case raise a reasonable inference that the defendant acted as an accomplice, it is appropriate to instruct the jury on accomplice liability even where the defendant was charged as a principal. Id. “While the defendant’s presence during the commission of the crime or the failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, they may be considered along with other facts and circumstances tending to show participation.” Hodge v. State, 688 N.E.2d 1246, 1248 (Ind. 1997).

Neukam does not argue that the instruction misstates the law or that the substance of the instruction is covered by other instructions. Rather, Neukam argues that the instruction was erroneous because the evidence did not support the giving of the instruction. Specifically, Neukam argues that there was no evidence that Neukam aided or induced the other individual to commit an offense or that Neukam controlled items in the other individual’s possession. Neukam argues that the evidence merely showed his lack of objection to the other’s conduct, which is insufficient to establish accomplice liability.⁶

⁶ Neukam also argues that “the other individual *had been* convicted of the offense at the time of trial, contrary to the instruction. At the very least, this instruction would have been confusing to the jury after it had received evidence of the other individual’s guilty plea.” Appellant’s Brief at 8. Neukam did not object to this instruction on this basis and fails to develop a cogent argument on appeal. Thus, Neukam has waived this argument. See Mitchem v. State, 685 N.E.2d 671, 675 (Ind. 1997) (holding that a party is required to distinctly state the matter to which the party objects and the grounds of the objection and failure to do so results in waiver); Davenport v. State, 734 N.E.2d 622, 623-624 (Ind. Ct. App. 2000), (holding that failure to put forth a cogent argument acts as a waiver of the issue on appeal), trans. denied.

The record reveals that Neukam and Hill entered the drugstore together. Neukam grabbed a bottle of wine, put it in his left pocket, and put his shirt over it. Hill knocked a security cap off of a bottle of liquor. Hill put other bottles in his pants and one of the bottles had the security cap “knocked off.” Transcript at 45. Biggerstaff said, “Well you guys are gonna have to pay for this.” Id. at 20. Hill said, “We’re not payin’ for shit,” and Neukam and Hill laughed. Id. Neukam and Hill laughed as they left the store without paying, got in a van, and Neukam drove the van away. The evidence supported the instruction on accomplice liability. We cannot say that the trial court abused its discretion by giving this instruction. See, e.g., Cowan v. State, 783 N.E.2d 1270, 1276-1277 (Ind. Ct. App. 2003) (holding that the evidence supported the instruction on accomplice liability).

III.

The next issue is whether the trial court abused its discretion in sentencing Neukam. We note that Neukam’s offense was committed after the April 25, 2005, revisions of the sentencing scheme.⁷ In clarifying these statutory revisions, the Indiana Supreme Court has held that “the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of

⁷ Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005).

discretion. Id. An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Id.

A trial court abuses its discretion if it fails “to enter a sentencing statement at all,” enters “a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons,” enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration,” or considers reasons that “are improper as a matter of law.” Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Neukam argues that the trial court abused its discretion by ignoring significant mitigating circumstances that were clearly supported by the record. “The finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” O’Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). “Nor is the court required to give the same weight to proffered mitigating factors as the defendant does.” Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating.

Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh’g denied. However, the trial court may “not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.” Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

Neukam appears to argue that the trial court failed to find the following mitigators: (1) the stolen items were of minimal value; (2) there was no violence or threat of serious harm; and (3) Neukam did not resist the Evansville police. Neukam has waived this claim because he failed to ask the trial court to consider these facts as mitigators.⁸ See Anglemeyer, 868 N.E.2d at 492 (holding that defendant’s failure to advance mitigating circumstances at sentencing precluded appellate review of alleged mitigating circumstances); Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (holding

⁸ At sentencing, Neukam’s attorney stated:

Your Honor, this was a jury trial, you may recall there was admitted some evidence that the co-defendant, Terry Hill, was charged in misdemeanor court and received a fine and costs. The allegations here were three bottles of liquor and maybe a Slim Jim, not regarding Mr. Neukam, but certainly three bottles of liquor was all that was alleged to have been stolen here. I think the . . . the fact that he took it to trial should not be penalized against him. I think when you look at the fairness of the situation in light of co-defendants and sentences they may received or charges they may have been charged with, I think the appropriate sentence here is one year at the Department of Corrections, consecutive to the other case.

Transcript at 170. This can hardly be considered a specific request that the trial court consider the factors

that defendant waived his claim because he failed to raise proposed mitigators at the trial court level).

IV.

The next issue is whether Neukam's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Neukam and Hill entered the drugstore and Neukam picked up a stick of beef jerky, opened it, and ate it. Neukam grabbed a bottle of wine, put it in his left pocket, and put his shirt over it. When the drugstore's assistant manager said, "Well you guys are gonna have to pay for this," Hill said "We're not payin' for shit," and Neukam and Hill laughed. Transcript at 20. Neukam and Hill again laughed as they left the store without paying.

Our review of the character of the offender reveals that Neukam has convictions for theft as a class D felony in 1978, theft as a class D felony in 1983, possession of marijuana as a class D felony in 1985, burglary as a class C felony and theft as a class D

Neukam now proposes on appeal.

felony in 1986, battery as a class A misdemeanor and possession of marijuana as a class D felony in 1995, conversion as a class A misdemeanor in 1998, theft as a class D felony in 1999, theft as a class D felony in 2000, conversion as a class A misdemeanor in 2001, conversion as a class A misdemeanor in 2003, resisting law enforcement as a class D felony in 2003, and theft as a class D felony in 2005. Neukam also has convictions for residential burglary and receiving stolen property in Illinois. After due consideration of the trial court's decision, we cannot say that the sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Sallee v. State, 785 N.E.2d 645, 654 (Ind. Ct. App. 2003) (concluding that the defendant's sentence was not inappropriate), trans. denied, cert. denied, 540 U.S. 990, 124 S. Ct. 480 (2003).

For the foregoing reasons, we affirm Neukam's conviction and sentence for theft as a class D felony.

Affirmed.

MAY, J. and BAILEY, J. concur